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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN GEORGE WINSTEAD, Defendant and Appellant.	G029787 (Super. Ct. No. 00WF0132) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Reversed and remanded.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda L. Cartwright-Ladendorf, Deputy Attorney General, for Plaintiff and Respondent.

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Steven George Winstead appeals from the judgment granting him probation after a jury found he cultivated marijuana and committed a battery on his spouse.[1] (See Health & Saf. Code, § 11358; Pen. Code, § 243, subd. (e)(1).) He contends the trial court erred when it excluded certain testimony by a doctor regarding alleged threats by the government to doctors in general. He also argues reversal is warranted for instructional error because the trial court rejected his requested instruction regarding mistake of fact as a defense and the standard of proof for his "compassionate use" defense under Health and Safety Code section 11362.5. The Attorney General concedes instructional error occurred, but argues it was harmless beyond a reasonable doubt. We reverse and remand for a new trial due to the instructional error.

FACTS

In January 2000, Winstead and his wife, Dana, argued when she told him she was divorcing him. She insisted on taking their three-year-old son with her: She knew Winstead was growing marijuana in the garage and felt he had a drug problem that needed to be addressed. Winstead threatened to fight for custody of the boy. The argument escalated into violence when he grabbed her arm and twisted it behind her back, causing her to fall. She left and reported the incident to the police, noting that she had seen a group of marijuana plants, each about a foot high, as well as dried marijuana in the garage as recently as the previous day. She also said that Winstead had been smoking the substance for at least five years.

Two officers with the Garden Grove Police Department's narcotics unit went to the Winstead home and watched it from their undercover car. They saw Winstead arrive in a van with his neighbor, Gene Fisher, who was driving. Fisher went into his home and emerged, carrying folded trash bags. He then entered the Winstead residence, and both men later were seen carrying now-full trash bags over to the van.

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[1] Winstead originally faced a charge of inflicting a corporal injury on his spouse, but the jury acquitted him of that charge, returning a verdict of guilt on the lesser included offense of battery instead.

The police detained the men, searched the van, and found a few garbage bags filled with now-empty jugs of liquid plant fertilizer. Inside Fisher's garage, the officers found 10 marijuana plants in five buckets, but no other evidence of marijuana cultivation. In a shed in Fisher's backyard, however, the authorities found seven large plastic bags filled with marijuana, totaling over 1,000 grams in weight. Fisher's home contained another 312 grams of the plant in the bedroom and 5.8 grams of it in the living room.

Winstead's garage, on the other hand, contained only a small pile of debris in which marijuana leaves were commingled with other trash. However, the garage itself had been converted into a "grow room"[2] with a water filtration system, climate control, light timer, pumps for the water system and bottles of liquid plant food. The officers opined that this fully enclosed room was for the cultivation of marijuana, and all the plants and products raised in it had been recently transferred to Fisher's house. This opinion was substantiated by the officers' discovery in Winstead's laundry room of computer messages about marijuana cultivation problems and—adjacent to the laundry room but outside the house—a bag of marijuana weighing 277 grams, along with a large amount of foam used to start marijuana seedlings.

Inside Winstead's house, the officers discovered a closet that also had been converted into a grow room: A fluorescent light was strung above seedling trays into which hoses pumped water. They also found marijuana debris in the fireplace. Extrapolating from the total amount of marijuana found in the search of both Fisher's and Winstead's homes, the police officer opined that approximately 7,200 marijuana cigarettes could be made from the materials, allowing a person to smoke 19 such cigarettes per day for a year. Such an inventory would carry a value of about $25,000. One detective believed that such a substantial amount was not grown for personal use, even if there was a medical need for it.

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[2] Inside the garage was an enclosed room with the dimensions of 10 feet by 10 feet, with a ceiling height of eight feet.

Winstead testified that he ruptured a disk in his back while doing construction work in 1992. After surgery for this problem, he also received injuries in a car accident, two separate falls and foot surgery. As of January 1999, he could no longer do construction work.

Soon after the ruptured disk, Winstead testified he began seeing a psychiatrist, Dr. Thomas Kappeler, for pain management. According to Winstead, Kappeler recommended and approved Winstead's use of marijuana for relieving the pain in 1997. However, Kappeler never monitored Winstead's use of it, nor did Winstead ever discuss it with him thereafter.

Kappeler, however, contradicted this testimony, saying instead that he and Winstead had a discussion regarding marijuana use for pain control, but he never recommended it to Winstead. He feared engaging in such a controversial treatment "because the federal government is quite active in repression of this practice."

David Wooden, an attorney with the Alternate Public Defender's Office, then testified that he was the original assigned attorney for Winstead. Early in the investigation of the case, Kappeler told Wooden that he *had* suggested that Winstead continue using marijuana, if it helped him by reducing the pain.

Winstead testified he did not cultivate any marijuana until after the passage of Proposition 215, the "Compassionate Use Act of 1996." Moreover, he waited to grow it until 1999—two years after Kappeler recommended his use—because his wife disapproved of it.[3]

Dr. David Bearman, a medical doctor currently treating patients who use marijuana for medical reasons, testified that marijuana probably would have helped ease Winstead's pain. He conceded, however, that nowhere in any of Winstead's medical records did it reflect that he was being treated with marijuana under a doctor's care.

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[3] Dana corroborated that Winstead started cultivating marijuana in 1999.

Christopher Conrad, a self-described cannabis expert, concluded that the marijuana found in Winstead's and Fisher's homes was for personal use, in that he calculated the amount would have reasonably yielded an average of three marijuana cigarettes a day for one year.

DISCUSSION

A. Exclusion of Evidence of Government Threats

The defense sought to have Dr. Bearman testify that the federal government engaged in coercive, threatening prosecutions of medical doctors who recommended marijuana for their patients. The purpose of this testimony was to impeach their own witness, Dr. Kappeler, who had denied ever prescribing marijuana for Winstead's pain management, although he conceded that he suggested Winstead continue using marijuana after Winstead told him he was already using it for that purpose. The trial court, however, excluded such testimony on the grounds it was speculative: Dr. Bearman did not have personal knowledge that other California physicians would *perjure* themselves because the governmental policy had so intimidated them.

Evidentiary rulings on relevance will not be disturbed on appeal unless shown to be an abuse of the wide discretion granted to the trial court. (See *People v.Milner* (1988) 45 Cal.3d 227,239.) As Kappeler never testified that *he* was intimidated by this governmental policy to change his testimony for fear of prosecution, there was no connection between the proposed testimony and the witness who supposedly feared the prosecution. (See *People v. Johnson* (1984) 159 Cal.App.3d 163, 169.) Moreover, the jury got the full picture from the testimony of Wooden and Bearman in conjunction with Kappeler's own statement that the federal government was "active" in "repressing" such conduct by doctors. No error occurred by barring Bearman from going into an extraneous explanation when the actual witness provided more direct testimony of the influence. (See generally, *People v. Yeats* (1984) 150 Cal.App.3d 983, 986 [witness can

be impeached with evidence of his or her fear, even though it was not defendant who threatened the witness].)

B. Instructional Error

The Attorney General concedes the trial court erred by instructing the jury Winstead had the burden of proving the facts for his compassionate use defense by a preponderance of the evidence, using former CALJIC No. 12.24.1. The California Supreme Court disapproved the instruction in *People v. Mower* (2002) 28 Cal.4th 457, holding that a defendant must raise only a reasonable doubt of the truth of the charge with his or her foundational facts of the compassionate use of marijuana. (*Id.* at p. 484.) The remedy for this error, the Attorney General argues, is not reversal because the dispute at trial was not one of the degree of proof but of credibility between Winstead and Kappeler, Winstead's (former) wife, and the narcotics officers. We disagree, in light of the other instructional error committed by the court.

Winstead requested the trial court instruct the jury that an "act [] or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus, a person is not guilty of a crime if he [] commits an act . . . under an actual and reasonable belief in the existence of certain facts and circumstances which, if true, would make the act . . . lawful." (CALJIC No. 4.35.) The court denied the request, reasoning that Winstead's evidence, even if fully believed, did not warrant the instruction: Winstead never alleged that *he* misunderstood an equivocal expression by Kappeler to be a prescription for marijuana, but that Kappeler *approved and recommended*[4] the marijuana for his pain management, and he (Winstead) relied on that prescription before commencing his cultivation. Either the jury believed Winstead—and thereby acquitted him of the charge—or it believed Kappeler, which would leave

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[4] In *People v. Trippet* (1997) 56 Cal.App.4th 1532, it was established that the Compassionate Use Act required proof that a medical doctor "approved or recommended" the marijuana use for a medical reason before marijuana possession could be free from criminal penalty.

Winstead without a factual basis for his "compassionate use" defense. (See Health & Saf. Code, § 11362.5.)

A trial court must instruct on the relevant principles of law related to the facts in the trial, which will assist the jury in deciding the issues. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The facts must support the need for the legal principle by "substantial evidence" before the instruction is mandated. (See *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) No duty exists for the trial court to instruct the jury on principles not necessarily raised by the facts. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1050.) Accurate instructions must be given regarding the burden of proof and relevant defenses. (*People v. Mower, supra,* 28 Cal.4th at pp. 483-484.)

In weighing whether to give a defense requested instruction, all factual disputes should be resolved in favor of the defense. (See *People v. Flannel, supra,* 25 Cal.3d at 685.) Substantial evidence is defined as that which "'reasonably inspires confidence and is of "solid value."'" (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) The mistake-of-fact instruction is mandated "whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief . . . ." (*People v. Williams* (1992) 4 Cal.4th 354, 364.) As Kappeler conceded that he told Winstead that his continued marijuana use was appropriate if it was helping to relieve pain, the jury could have accepted that statement as the "equivocal" approval and recommendation Winstead interpreted as a prescription for the drug. As such, the facts supported the mistake-of-fact instruction, particularly in light of the court's error in telling the jury Winstead had to prove the facts underlying his compassionate use defense. Armed with this instruction, the defense would then have to explain why Winstead went to such complicated efforts to conceal his marijuana garden if he honestly believed Kappeler had prescribed marijuana for him.

The sole issue remaining is whether the instructional errors require reversal. The Supreme Court explicitly refrained from determining whether the standard of proof

error in former CALJIC No. 12.24.1 was of constitutional dimension requiring reversal unless the error was harmless beyond a reasonable doubt. (*People v. Mower, supra,* 28 Cal.4th at p. 484.) However, in this case as in *Mower*, reversal is required under *either* standard.[5] Had the jury known that Winstead had met his burden by merely raising a reasonable doubt based on his mistaken belief that Kappeler had recommended his continued marijuana use to control his back pain, it may very well have rendered a different verdict.

The judgment is reversed and the case remanded for a new trial in conformity with this opinion.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.

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[5] "If a trial court's instructional error violates the United States Constitution, the standard stated in *Chapman v. California* (1967) 386 U.S. 18, 24, requires the People, in order to avoid reversal of the judgment, to 'prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.' (See *People v. Simon, supra*, 9 Cal.4th at p. 506, fn. 11.) But if a trial court's instructional error violates only California law, the standard is that stated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which permits the People to avoid reversal unless 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (See *People v. Simon, supra*, 9 Cal.4th at p. 506, fn. 11.) [¶] We have left open the question whether an instructional error like that committed by the trial court in the present case is of federal constitutional dimension or only of state law import (*People v. Simon, supra*, 9 Cal.4th at p. 506, fn. 11) and need not resolve this question here, because the error requires reversal even under the less rigorous *Watson* standard. [¶] There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' (*People v. Watson, supra,* 46 Cal.2d at p. 837.)" (*People v. Mower, supra,* 28 Cal.4th at p.484.)